

No. 16516

United States Court of Appeals
For the Ninth Circuit

AUDY W. DEERE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court for the
District of Alaska, Fourth Division.

APPELLANT'S BRIEF.

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STATEMENT OF FACTS.

Appellant was convicted of violating Section 50-5-3 of the Alaska Compiled Laws Annotated 1949 (operating a motor vehicle while under the influence of liquor).

Appellant was sentenced February 26, 1959, and an order and judgment, incorporating all of the proceedings had in the case, was duly entered March 3, 1959.

Appellant, prior to the taking of any testimony (other than of one witness), moved to challenge the jurisdiction of the Court on the ground that the Court in its present status can take no cognizance of any Territorial offense (T.R. pp. 2-4).

After the conclusion of the testimony and after the verdict, the appellant renewed the motion, basing his objection to the jurisdiction on the grounds originally urged at the opening of the trial (T.R. p. 5).

I.

THE COURT LACKED JURISDICTION TO ENTERTAIN ANY PHASE OF THE PROCEEDINGS.

Congress established a District Court for the District of Alaska with general jurisdiction in civil and criminal proceedings and the establishment of such Court was strictly incidental to the territorial status.

The judges appointed to preside over these Courts hold their respective offices for the term of four years and until their successors are appointed and qualified.

The functioning Courts in Alaska are thus legislative in character, established under Article IV, Section 3 of the United States Constitution, and are distinguished from the Constitutional Courts under Article III, Section 1 of the United States Constitution (see *McAllister v. U. S.*, 141 U.S. 174).

After many years of petitioning Congress, Alaska was admitted to Statehood on July 7, 1958, pursuant to a Statehood Act, passed by Congress.

Prior to admission Alaska duly convened a Constitutional Convention and passed and adopted an Alaska Constitution.

Unlike Hawaii, Alaska during its territorial status did not create or organize any territorial Court system, depending solely on the Court system functioning at the time of Alaska's admission into the Union.

The District Court in Alaska, as pointed out in the *McAllister* case, has dual jurisdiction, that is, to administer the Federal laws and also the right to administer the Territorial statutes. We are confining our argument solely to the right of the Court to administer the Territorial acts since the admission of Alaska as a State.

This distinction between Constitutional and Legislative Courts was first established in *American Insurance Company v. Cante*, 26 U.S. 511 (1828). In said case, the United States Supreme Court, Chief Justice Marshall, in discussing the jurisdiction of the Territorial Courts in Florida, stated at 26 U.S. 545:

“ . . . The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not Constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are Legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d Article of the Constitution, but is conferred by Congress, in the execution of those general powers which that

body possesses over the territories of the United States.”

Thereafter, in the leading case, the United States Supreme Court in *Brenner v. Porter*, 50 U.S. 235, Justice Nelson writing the opinion, held that the Superior Court for the Southern District of the Territory of Florida could not constitutionally exercise admiralty jurisdiction after the admission of Florida into the Union of States. The basis of the decision is that under Section 2, Article III of the United States Constitution, “the judicial power shall extend . . . to all Cases of Admiralty and Maritime jurisdiction . . .”. Section 1 of the same Article provides:

“Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such Inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, *shall hold their Offices during good behaviour . . .*” (Emphasis supplied).

Inasmuch as the judges of the Superior Court for the Southern District of the Territory of Florida did not “hold their offices during good behaviour”, but acted under a shorter tenure, that Court was incapable of exercising “the judicial power of the United States” over “all cases of Admiralty and Maritime jurisdiction”. The power of Congress to confer such Admiralty jurisdiction on Legislative Courts under Article IV, Section 3, second paragraph (pertaining to territories) had terminated when Florida became a State. Thus the Supreme Court stated at pages

243 and 244 of Volume 50 of the United States Reports:

“The admission of the State into the Union brought the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument. By Art. 3, §1, ‘The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behaviour.’

Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the Judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution. The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal Government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. (1 Peters, 546.) Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State.” (Emphasis supplied.)

At page 245, Justice Nelson further stated as follows:

“We have chosen to place the decision upon the effect of the admission of the State with a government already organized under her constitution, and prepared to go into immediate operation, because such is the case presented on the record; but we do not thereby intend to imply or admit that a different conclusion would have been reached if it had been otherwise, and the State had come into the Union with nothing but her organic law, leaving the organization of her government under it to a future period.”

A great deal of argument in the discussion of jurisdiction is laid on the proviso under the Alaska Constitution, Article 15, Section 2:

“Section 2. *Saving of existing rights and liabilities.* Except as otherwise provided in this constitution, all rights, titles, actions, suits, contracts, and liabilities and all civil, criminal, or administrative proceedings shall continue unaffected by the change from territorial to state government, and the State shall be the legal successor to the Territory in these matters.”

It is the contention of counsel that since the Court has completely lost its jurisdiction with the ascendancy of Statehood, that such jurisdiction can in no manner be divisible and that realistically speaking there is no Court to which jurisdiction can attach and that saving existing rights as attempted by Section 2 of the Alaska Constitution cannot be construed as a power to “create, ordain or establish” within the meaning of the constitutional provisions. That can only be accomplished by the Alaskan Legislature

deriving its right under the Judiciary Act of the Constitution as adopted by the Alaska voters and accomplished in futuro.

It is further interesting to note that the reason for the transitory existence of the Legislative District Courts is due to the transitory status of the Territory itself. The constant reference to an interim Court as an expedient method to fill in the hiatus is a nebulous thought. The historic development and growth of the country shows that territories upon attaining a stature of recognition join the other states and with the elimination of the Territorial status the jurisdictional system, solely dependent upon and incident to its existence, must of necessity lose its jurisdictional effect.

Procedurally, an appeal from any verdict founded on a Territorial statute could only lie to another judicial form provided under a new judicial structure as evolved in the Alaskan Constitution and, in the absence of such judicial forum, the defendant is bereft of his right to appeal.

CONCLUSION.

Appellant respectfully submits that the Legislative Courts of Alaska, incorporating the dual function of administering the Federal statutes as well as the Territorial statutes, have lost their function with the gaining of Statehood and that there is no authority for the Court to administer any of the Territorial laws since only a Court properly established and or-

dained to administer such laws by the Alaskan Constitution and having an appellate branch to enable a defendant the right of appeal, can exercise proper jurisdiction.

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